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July 17, 2020

FREEDOM OF INFORMATION ACT REQUEST

Submitted via <https://www.foiaonline.gov>

National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460

Regional Freedom of Information Officer
U.S. Environmental Protection Agency, Region 10
1200 6th Avenue
Suite 155, Mail Stop 11-C07
Seattle, WA 98101

Re: Records related to Safe Drinking Water Act Emergency Petition

Dear FOIA Officer:

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, submitted on behalf of Food & Water Watch. This request seeks all records regarding the Petition for Emergency Action Pursuant to the Safe Drinking Water Act § 1431, 42 U.S.C. § 300i, to Protect Citizens of the Lower Umatilla Basin in Oregon from Imminent and Substantial Endangerment to Public Health Caused by Nitrate Contamination of Public Water Systems and Underground Sources of Drinking Water ("Petition"), submitted on January 16, 2020. This request does not include the Petition itself or the documents appended to said Petition.

In particular, this request seeks:

- 1) The following records related to the Petition, from January 16, 2020 through the date of fulfillment of this request:
 - a. Correspondences between the U.S. Environmental Protection Agency ("EPA") and any state, regional, or local official or public body in Oregon, including but not limited to Oregon Department of Environmental Quality, Oregon Health Authority, Oregon Department of Agriculture, Morrow County Soil and Water Conservation District (a.k.a., Morrow Soil & Water Conservation District), and/or the Lower Umatilla Basin Ground Water Management Area Committee;

- b. Correspondences between EPA and third parties, such as legislators, media, or other federal agency officials;
 - c. Records regarding EPA's receipt of, processing of, or response to the Petition; and
 - d. All EPA internal communications.
- 2) All records related to the Lower Umatilla Basin Ground Water Management Area from January 1, 2015 through the date of fulfillment of this request.

This request applies to all such records in any form, including (without limit) correspondence sent or received, memoranda, notes, telephone conversation notes, maps, analyses, agreements, contracts, e-mail messages, and electronic files the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the specified subject matter of this request.

We emphasize that this request applies to all described documents the disclosure of which is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (1) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied); (2) explain in full the basis on which nondisclosure is sought; and (3) provide us with any segregable portions of the records for which you do not claim a specific exemption.

Interest of Requester

Food & Water Watch ("FWW") is a national, nonprofit membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests. One of FWW's specific focus areas is ensuring that communities have access to clean, safe drinking water.

Request for Responsive Documents in Electronic Form and on a Rolling Basis

To the extent possible, FWW requests that EPA provide any responsive documents to this request in electronic form. For such electronic documents, please deliver them by email or online file sharing service to the contact information provided below. FWW also requests that EPA produce responsive records on a rolling basis.

Fee Waiver Request

FWW requests that you waive any applicable fees for this request because disclosure is clearly in the public interest. As described below, disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); see 7 CFR 1, Subpart A, Appendix A, §6(a). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups, such as FWW, access to documents in the government’s control without the payment of fees. The courts have stated that the statute “is to be liberally construed in favor of waivers for noncommercial requesters.” See *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (stating “that Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters’”). As explained below, FWW meets the test for a fee waiver established in FOIA and outlined in the USDA implementing regulations, 7 C.F.R. Part 1, Subpart A.

I. Disclosure of This Information Is in the Public Interest because It Will Significantly Contribute to Public Understanding of the Operations or Activities of the Government

FWW qualifies for the fee waiver because the requested information will significantly contribute to public understanding of Federal government operations or activities. See 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(i-iv). FWW, a leading environmental and clean water organization, is recognized as an advocate for clean and accessible drinking water and possesses the ability to disseminate the requested information to the general public. FWW and a coalition of concerned organizations submitted the Petition out of concern for human health and welfare, and our assessment that state and local officials have not adequately addressed the human health emergency that has persisted and grown worse in the region. How EPA is responding to the Petition is of utmost importance to the Petitioners and those living and/or working in the affected region. This is precisely the type of information that FWW is well positioned to analyze and disseminate to our members and the general public to advance public understanding of EPA’s operations and activities regarding its execution of the Safe Drinking Water Act.

A. The subject matter of the requested documents concerns operations or activities of the Federal government

FWW seeks records regarding how EPA is handling and communicating about the Petition, which directly implicates EPA’s duties and responsibilities under the Safe Drinking Water Act. As such, the information requested clearly “concerns the operations and activities of the federal government.” 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(i).

B. The disclosure is likely to contribute significantly to public understanding of Federal government operations or activities

Disclosure is “likely to contribute to an understanding of Federal government operations or activities,” 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(ii). To our knowledge, EPA has thus far not taken action on the Petition, nor has it provided

transparency to the public on how it is handling the Petition. Therefore, the Petitioners and the general public at present are in the dark as to whether EPA has analyzed, seriously considered, or disregarded the Petition.

FWW's consistent contribution to public understanding of federal agency activities that affect the environment and drinking water, as compared to the level of public understanding prior to disclosure, is well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994). FWW is a membership organization with a staff of over 100, including researchers, organizers, attorneys, and communications professionals. Food & Water Watch has scientific and legal expertise and our staff regularly write, speak, and advocate on environmental and clean water issues.

FWW also has a demonstrated record of garnering significant media attention for our work related to Federal government transparency. We are uniquely qualified to analyze the EPA's consideration and treatment of the Petition thus far, present it in an easy to understand manner, and disseminate it to a large cross-section of the general population, such that the disclosure will "contribute to 'public understanding.'" 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(iii). Given FWW's expertise and ability to contribute to public understanding through various channels, FWW could "contribute significantly" to public understanding of whether or how EPA will move to protect the communities in the Lower Umatilla Basin Ground Water Management Area. 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(iv).

II. Food & Water Watch Has No Commercial Interest in Obtaining the Information

The second element of the fee waiver analysis addresses the requester's "commercial interest" in the information. Two questions must be addressed when determining whether the information requested is "primarily in the commercial interest of the requester." 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(vi). The first question is whether the requester has a commercial interest that would be furthered by the requested disclosure. 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(v). Here, as a 501(c)(3) nonprofit entity, FWW has no commercial, trade, or profit interest in the material requested. FWW would not be paid for, or receive other commercial benefits from the publication or dissemination of the material requested. The requested material would be disseminated solely for the purpose of informing and educating the public and would not be used for commercial gain.

The second factor hinges on the primary interest in the disclosure. 7 CFR 1, Subpart A, Appendix A, §6(a)(1)(vi). Clearly, there is public interest in the release of the materials sought because they will allow for a more thorough analysis of EPA's execution of the Safe Drinking Water Act and what it is doing to protect the vulnerable communities that depend on contaminated drinking water in the region. Thus, even if

FWW did have some “commercial” interest in the documents requested, a complete fee waiver would still be appropriate because FWW’s “primary” interest in the material is to inform the public about the operations and activities of the government. Therefore, this is not a situation in which “the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure that disclosure is primarily in the commercial interest of the requestor.” *Id.* The “disclosure of the information . . . is not primarily in the commercial interest of” FWW and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).

Conclusion

Accordingly, based on the above analysis, the requested records will contribute significantly to a broad public understanding of EPA’s operations and activities under the Safe Drinking Water Act, and will not serve any commercial interest on the part of FWW. Under these circumstances, FWW fully satisfies the criteria for a fee waiver. If for some reason the fee waiver is denied, please contact me before incurring any costs related to this request. If the fee waiver is not granted and costs are incurred prior to contacting me, FWW will not be responsible for any costs. FWW reserves the right to appeal any decision to deny the fee waiver request in this matter.

If any responsive records are withheld in full or in part, please explain the nature of the withheld records, the specific FOIA provision you believe justifies nondisclosure, and FWW’s appeal options. FWW expects that all reasonably segregable portions of records will be produced, as required by law.

If you have any questions or if you require further information to identify the requested records or rule on the fee waiver request, please contact me at (208) 209-3569 or tlobdell@fwwatch.org. Additionally, if you are not the proper recipient of this request, please identify which office has information responsive to this request.

Thank you in advance for your prompt reply.

Sincerely,



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